Supreme Court, U.S.
FILED
JUN 8 1994
OFFICE OF THE CLERK

No. 93-1818

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

WILLIAM P. HICKEY,

Petitioner,

v.

ROBERT B. HOLLISTER

and

OXLEY, MALONE, FITZGERALD & HOLLISTER,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

H. WILLIAM BAMMAN
Manahan, Pietrykowski,
Bamman & DeLaney
414 North Erie Street
P.O. Box 2328
Toledo, Ohio 43603
(419) 243-6148
Counsel for Respondents

QUESTIONS PRESENTED FOR REVIEW

1. WHETHER THE DISTRICT COURT AND THE SIXTH CIRCUIT COURT OF APPEALS PROPERLY CONCLUDED UNDER *LUGAR V. EDMONDSON OIL CO.*, 457 U.S. 922 (1982), THAT IN ORDER TO SATISFY THE "UNDER COLOR OF STATE LAW" REQUIREMENT IN AN ACTION BROUGHT UNDER 42 U.S.C. §1983, THE PLAINTIFF CANNOT MERELY CHALLENGE A PRIVATE PARTY'S ALLEGED MISUSE OF A STATE STATUTE, BUT MUST CHALLENGE THE CONSTITUTIONALITY OF THE UNDERLYING STATE PROCEDURE INVOKED BY DEFENDANT IN ORDER TO STATE A COGNIZABLE CLAIM.

2. WHETHER THE DISTRICT COURT AND THE SIXTH CIRCUIT COURT OF APPEALS PROPERLY CONCLUDED THAT GENERALIZED, UNSUPPORTED ALLEGATIONS THAT VARIOUS OHIO MUNICIPAL AND COMMON PLEAS COURT JUDGES CONSPIRED TO DEPRIVE PETITIONER OF HIS CONSTITUTIONAL RIGHTS DID NOT SATISFY THE "UNDER COLOR OF STATE LAW" REQUIREMENT NECESSARY TO MAINTAIN AN ACTION UNDER 42 U.S.C. § 1983.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 7

LAW AND ARGUMENT 8

A. The District Court And The Court Of Appeals Properly Held That Petitioner's Failure To Challenge The Constitutionality Of Any Ohio Statute, Rule Or Procedure Was Fatal To His Claim Under 42 U.S.C. § 1983 8

B. The District Court And The Court Of Appeals Correctly Determined That Petitioner's Generalized, Conclusory Allegations In His Amended Complaint Of A Conspiracy Between Respondents And A Host Of State Court Judges Did Not State A Claim For Relief Under 42 U.S.C. § 1983 12

C. Petitioner Mischaracterizes The Holdings Of The District Court And The Sixth Circuit Court Of Appeals When He Argues That His Complaint Was Dismissed Based On Immunity. At No Time Did Either Of The Lower Courts Ever Determine That Respondents Were Immune From Suit 16

CONCLUSION 20

TABLE OF AUTHORITIES

Cases: Page

Arsenaux v. Roberts, 726 F.2d 1022 (CA5 1982) 15

Adickes v. S.H. Kress & Co.,
398 U.S. 144 (1970) 7, 9, 20

Brinkman v. Johnston, 793 F.2d 111 (CA5 1986) 11

Dennis v. Sparks, 449 U.S. 24 (1980) 9, 13

Earnest v. Lowentritt, 690 F.2d 698
(CA5 1982) 9, 10, 11, 12
13, 14, 19

Flagg Brothers, Inc. v. Brooks,
436 U.S. 149 (1978) 8, 17
19, 20

Francis-Sobel v. University of Maine, 597 F.2d 15
(CA1 1979), *cert. denied*, 444 U.S. 949 (1979) 13

Glaros v. Perse, 628 F.2d 679 (CA1 1980) 13, 14

Gomez v. Toledo, 466 U.S. 635 (1980) 7, 8

Hale v. Harney, 786 F.2d 688 (CA5 1986) 13, 15

Jackson v. Metropolitan Edison Co.,
419 U.S. 345 (1974) 8

Page

Lugar v. Edmondson Oil Co.,
457 U.S. 922 (1982) 7, 9, 10, 11, 12
17, 19, 20

Parratt v. Taylor, 451 U.S. 527 (1981) 8

Skepton v. County of Bucks, Pa.,
613 F.Supp. 1013 (E.D.Pa. 1985) 13

Smith v. Wood, 649 F.Supp. 901 (E.D.Pa. 1986) 11

Thompson v. Aland, 639 F.Supp. 724
(N.D. Tex. 1986) 15

Wyatt v. Cole, __ U.S.__ (1992) 11, 17

Statutes:

42 U.S.C. § 1983 . . . . . 2, 5, 6, 7, 8, 9, 10, 11, 12
13, 14, 15, 16, 17, 19

Ohio Revised Code § 1901.30 3

Miscellaneous:

Federal Rule of Civil Procedure 12(b)(6) 5, 13

Ohio Rule of Civil Procedure 60(B) 3

No. 93-1818

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

WILLIAM P. HICKEY,

Petitioner,

v.

ROBERT B. HOLLISTER

and

OXLEY, MALONE, FITZGERALD & HOLLISTER,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

In his petition, Petitioner misstates and mischaracterizes the facts upon which the lower courts issued their decisions. Therefore Respondents set forth the following factual summary.

Petitioner, William P. Hickey, is a licensed attorney in good standing with the Ohio Supreme Court.[1] He is a resident of Sandusky County, Ohio where he purchased electricity from Hancock Wood Electric Cooperative ("Hancock Wood"). On October 2, 1992, Petitioner filed a complaint in the United States District Court for the Northern District of Ohio, Western Division, claiming relief under 42 U.S.C. § 1983 for alleged violations of his constitutional rights.[2] Petitioner named as defendants the Findlay, Ohio law firm of Oxley, Malone, Fitzgerald & Hollister and Robert B. Hollister, a partner with that firm (hereinafter the "Oxley Firm").

The claims in the complaint arose out of Respondents' representation of Hancock Wood in a legal proceeding filed in the Bowling Green Municipal Court in which Petitioner was the named defendant. In that case, Hancock Wood sued Petitioner for sums due and owing on his delinquent electric account totaling $1,947.62. That proceeding resulted in a judgment being entered by the Bowling Green Municipal Court in favor of Hancock Wood.

Petitioner made a limited appearance in the Bowling Green Municipal Court to contest the court's jurisdiction and to request that the case be dismissed. After the Municipal Court overruled Petitioner's jurisdictional objections, he made no further appearance. Petitioner did not file an answer or

---

[1] Petitioner's Ohio Supreme Court registration number is 0022318.

[2] Petitioner alleged in his complaint that Respondents committed an abuse of process and malicious prosecution in pursuing the underlying state court relief.

otherwise move or plead. Accordingly, the Municipal Court granted Hancock Wood's motion for a default judgment.

When Petitioner failed to pursue an appeal from the judgment of the Municipal Court, that judgment became final pursuant to Ohio Revised Code § 1901.30. Thereafter, Petitioner failed to appear for a judgment-debtor examination causing the Municipal Court to issue a bench warrant for his arrest.[3] On January 5, 1992, Hickey was arrested and placed in the custody of the Wood County Sheriff. Hickey's bond was set at the full amount of the judgment owed to Hancock Wood. A relative of Hickey paid the bond and Hickey was released from custody on January 7, 1992.

Rather than defend the action in the Bowling Green Municipal Court, Petitioner chose not to appear, but instead to file a collateral attack on that court's judgment in the Court of Common Pleas of Sandusky County. In his complaint filed in the Sandusky County Court of Common Pleas, Petitioner alleged, *inter alia*, malicious prosecution, false arrest and abuse of process against Hancock Wood for pursuing and obtaining the judgment in the Bowling Green Municipal Court. On March 10, 1992, the Sandusky County Court of Common Pleas transferred this collateral attack on the judgment of the Bowling Green Municipal Court to the Court of Common Pleas of Wood County. Although the case was originally assigned to Judge Charles F. Kurfess, Petitioner filed a series of objections against Judge Kurfess

---

[3] At no time did Petitioner seek relief under Rule 60(B) of the Ohio Rules of Civil Procedure from the judgment of the Bowling Green Municipal Court.

causing his withdrawal. The case was then assigned to Judge Gale Williamson who likewise withdrew. After Judge Williamson withdrew, the case was assigned to Judge Donald E. DeCessna. However, Judge DeCessna eventually withdrew after Petitioner filed suit against him. The case was finally assigned by the Ohio Supreme Court to Judge James Barber.

On September 4, 1992, Judge Barber issued a Memorandum Opinion and Order dismissing the complaint. Judge Barber reasoned that Petitioner's complaint was nothing more than a collateral attack on the Municipal Court judgment and hence barred by *res judicata*. Accordingly, the validity of the underlying Municipal Court judgment has been litigated not once--but twice--first, in the Bowling Green Municipal Court and then in the Court of Common Pleas of Wood County.[4]

After the adverse judgment of the Court of Common Pleas of Wood County, Petitioner filed the instant action against the Oxley Firm on October 2, 1992, in the United States District Court for the Northern District of Ohio, Western Division. The claims presented are a transparent attempt to relitigate for a third time, albeit against the attorneys representing Hancock Wood, the underlying state

---

[4] Petitioner appealed the judgment of the Wood County Court of Common Pleas to the Sixth District Court of Appeals for Wood County in Case No. 92-WD-063. On June 30, 1993, the Court of Appeals reversed the trial court's dismissal, holding that the lawsuit was not barred by *res judicata* or collateral estoppel. See, *Hickey v. Hancock Elec. Coop.*, Case No. 92WD082, decided June 30, 1993, jurisdictional motions overruled 1993 Ohio Lexis 2419, 622 N.E.2d 654 (1993), attached to Petitioner's petition at page 1 of the appendix.

court judgment. In his original complaint filed in the District Court, Petitioner acknowledged that the underlying judgment against him was procured for Hancock Wood and that the function of the Oxley Firm was only to provide legal representation. Petitioner then alleged in broad, conclusory fashion that Respondents fraudulently and maliciously procured the underlying judgment in the Bowling Green Municipal Court thereby depriving him of his constitutional rights under 42 U.S.C. § 1983.

On November 23, 1992, Respondents filed a motion to dismiss the complaint for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) because Petitioner did not allege that his claimed constitutional injuries arose "under color of state law." Petitioner then filed an amended complaint alleging in generalized, conclusory fashion that the Oxley Firm and various state court judges committed "fraud" and "conspired" to deprive Petitioner of his constitutional rights "under color of state law"

On January 19, 1993, the Oxley Firm filed its Reply Memorandum in support of dismissal of the complaint arguing that the allegations in the amended complaint failed to state a claim upon which relief could be granted because there was no challenge to the statutory procedure used to procure the underlying state court judgment. Without a declaration that the underlying statutory procedure used by Respondents was in any way constitutionally infirm (and Petitioner made no such claim), there was no deprivation of any right or privilege under color of state law for which a remedy is available under 42 U.S.C. § 1983. In addition, Respondents argued that Petitioner's generalized, conclusory

allegations of a conspiracy between the state court judges and the Oxley Firm were a transparent attempt to meet the "under color of state law" requirement and avoid dismissal of his claim.

On February 2, 1993, the District Court granted Respondent's Motion to Dismiss finding that Petitioner's failure to challenge any underlying Ohio statutory procedure used to pursue the judgment in the Bowling Green Municipal Court was fatal to his claim under 42 U.S.C. § 1983. The court specifically determined that Respondents were *not* acting "under color of state law" by obtaining and proceeding to collect on the state court judgment. From that determination, Petitioner filed an appeal to the Sixth Circuit Court of Appeals.

The Court of Appeals unanimously affirmed the District Court's dismissal. The Court of Appeals reviewed Petitioner's appeal *de novo*, accepting as true all factual allegations in the complaint. The Court of Appeals determined that Petitioner's complaint failed to satisfy the "under color of state law" requirement of 42 U.S.C. § 1983 because: (1) Petitioner did not challenge any underlying state statute or procedure invoked by Respondents in pursuing the judgment or collection of that judgment and, (2) that the generalized, conclusory allegations of a conspiracy between Respondents and the various Ohio Common Pleas and Municipal Court judges were insufficient to state a claim under § 1983's color of state law requirement.

SUMMARY OF ARGUMENT

To state a claim under 42 U.S.C. § 1983 a plaintiff must allege (1) the deprivation of a right secured by the Constitution or laws of the United States and (2) that the deprivation was caused by a person acting under color of state law. *Gomez v. Toledo*, 466 U.S. 635 (1980). Where a private person, such as Respondent law firm, invokes a state created procedure on behalf of a client and is later sued under § 1983, the plaintiff must plead facts sufficient to satisfy the "under color of state law" requirement. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970).

Thus, in order to state a claim for relief under § 1983 in an action against a private party, a plaintiff must either challenge the constitutionality of the state statute or allege with sufficient specificity that the private party received significant aid from state officials so as to qualify as conduct chargeable to the state. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982). Where a plaintiff does not challenge a state statute or procedure as violative of the Constitution or federal law, but merely takes issue with defendants' use of the state procedure, no claim is stated under § 1983.

Similarly, no claim is stated under § 1983 by the presence of broad, sweeping allegations of a conspiracy between a defendant law firm and the judges who adjudicated the underlying state court proceeding. Allegations of a conspiracy must be plead with some degree of specificity. Vague, conclusory statements unsupported by material facts are not be sufficient to state a claim under § 1983. Because Petitioner failed to challenge the underlying procedure

invoked by Respondents in the state court proceeding, and because the allegations of a conspiracy in his amended complaint were vague and conclusory, the District Court and the Sixth Circuit Court of Appeals properly dismissed the complaint for failure to state a claim.

LAW AND ARGUMENT

A. The District Court And The Court Of Appeals Properly Held That Petitioner's Failure To Challenge The Constitutionality Of Any Ohio Statute, Rule Or Procedure Was Fatal To His Claim Under 42 U.S.C. § 1983.

It is well-established that in order to maintain a cause of action under 42 U.S.C. § 1983, a plaintiff must allege two separate elements: (1) that the conduct complained of was committed by a person acting under color of state law and, (2) that the conduct deprived that person of rights, liberties, privileges or immunities secured by the Constitution or laws of the United States. *Parratt v. Taylor*, 451 U.S. 527, 535 (1981); *Gomez v. Toledo*, 466 U.S. 635, 640 (1980).

The federal courts have communicated a clear message regarding suits filed under 42 U.S.C. § 1983; that is, § 1983 does not reach all claimed constitutional injuries, but only those caused by persons acting "under color of state law." *Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149 (1978); *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974). Before a non-state actor like the Oxley Firm acts "under color of state law" something more than the utilization of a

state statute or procedure must be present. The federal courts have consistently held that the mere use of a state court tribunal to pursue a remedy is insufficient to establish the "under color of state law" requirement of § 1983. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970); *Earnest v. Lowentritt*, 690 F.2d 698 (CA5 1982).

Merely invoking a state court procedure and being on the winning side does not satisfy the "under color of state law" requirement of § 1983. *Dennis v. Sparks*, 449 U.S. 24 (1980). Instead, where a private individual is named as a defendant in a § 1983 action as a result of invoking a state court procedure, the Petitioner cannot satisfy the "under color of state law" requirement unless he specifically sets forth a claim *with* supporting allegations (1) that the defendant and the state court acted together in a corrupt manner or (2) that the underlying statutory procedure invoked by the private party is unconstitutional. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982); *Earnest v. Lowentritt*, 690 F.2d 698 (CA5 1982).

Petitioner made absolutely no claim in either his original or amended complaints that the procedure invoked by the Oxley Firm to obtain the underlying judgment was constitutionally infirm. Instead, Petitioner's objections were limited to generalized claims that Respondents allegedly acted "maliciously" when pursuing the underlying claim on behalf of Hancock Wood. When read in a light most favorable to Petitioner, the complaint merely questioned whether the underlying judgment was "unlawful." This precise claim, involving the alleged private misuse of a state procedure without a concomitant claim challenging the underlying state

procedure was expressly considered and held not to be actionable under 42 U.S.C. § 1983 in *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982).

In *Lugar*, this court considered whether a private party can be liable under § 1983 for invoking a state court procedure providing for garnishment, prejudgment attachment and replevin. The Petitioner in *Lugar* claimed that he was deprived of property as a result of "malicious, wanton, willful, opressive [*sic*], [and] unlawful acts" when the defendant invoked a state collection procedure. *Id.* at 940. As in the present case, there was no claim that the state procedure used to pursue the judgment was constitutionally deficient. Without challenging the underlying procedure used by the private party, the Supreme Court held there was no conduct that could be attributed to the state and that a claim against a private individual under § 1983 did not exist. *Id.* at 940-941. See, also *Earnest v. Lowentritt*, 690 F.2d 1198 (CA5 1982), wherein the court reasoned that just because a party uses a state court procedure to obtain a judgment and satisfy a debt "is not sufficient to raise the issue of state action [necessary for a proceeding under 42 U.S.C. § 1983]." *Id.* at 1202.

Petitioner's failure to challenge any state procedure used by the Oxley Firm in the pursuit of the underlying judgment was properly held by the District Court to be fatal to his claim under § 1983.[5] In essence, Petitioner's original

---

[5] Petitioner has not attempted to allege, nor could he allege, that his case fits into that line of prejudgment attachment, garnishment or replevin cases where due process concerns arise. Rather, like the Petitioner in

(continued...)

and amended complaints alleged that he was dissatisfied with the state court judgments and his complaints can fairly be said to be a collateral attack on those judgments. Such collateral attacks have routinely been dismissed by the federal courts. *Brinkman v. Johnston*, 793 F.2d 111 (CA5 1986), (dismissing civil rights action under § 1983 arising from state court divorce proceeding as being collateral attack on state court judgment). See, also *Smith v. Wood*, 649 F.Supp. 901 (E.D.Pa. 1986), (§ 1983 action contesting underlying state court competency adjudication without challenging state court procedure was dismissed as being a collateral attack on that judgment).

In the present case, the District Court and the Court of Appeals correctly determined that Petitioner failed to challenge any state procedure used by the Oxley Firm in obtaining the underlying judgment in the Bowling Green Municipal Court.[6] Nor did Petitioner challenge any procedure which

---

[5](...continued)
Earnest v. Lowentritt, Hickey was sued in an ordinary civil proceeding where he not only had notice and an opportunity to be heard, but he had the opportunity to fully litigate the underlying civil proceeding prior to the initiation of any collection attempts.

[6] Moreover, even if Petitioner had challenged a state procedure, his claim would still have failed. Unlike the replevin and prejudgment attachment statutes that were reviewed in *Lugar* and *Wyatt v. Cole*, __ U.S.__ (1992), in the instant case Petitioner received notice and had an opportunity to fully litigate and appeal the underlying state court judgment. Petitioner made a calculated decision not to make an appearance and defend in the Bowling Green Municipal Court proceeding resulting in a judgment being rendered against him. Thus, there are no parallels between the instant case and those cases where the courts have
(continued...)

resulted in the dismissal of his collateral attack by the Court of Common Pleas of Wood County. This failure was properly held by the lower courts to defeat Petitioner's claims. As the courts correctly determined, Petitioner only alleged that he was dissatisfied with the private actions of the Oxley Firm in obtaining a judgment on behalf of their client against him. Such private action, however, is not subject to suit under 42 U.S.C. § 1983. *Lugar.* To hold otherwise would transform every state civil case into "state action of constitutional dimensions" and subject to review by the federal Courts under § 1983. *Earnest v. Lowentritt, supra.*

B. The District Court And The Court Of Appeals Correctly Determined That Petitioner's Generalized, Conclusory Allegations In His Amended Complaint Of A Conspiracy Between Respondents And A Host Of State Court Judges Did Not State A Claim For Relief Under 42 U.S.C. § 1983.

In a desperate attempt to avoid dismissal of his complaint by the District Court, Petitioner amended his complaint and alleged the existence of a conspiracy between the Oxley Firm and various Municipal and Common Pleas Court judges who adjudicated Hancock Wood's claim and

---

[6](...continued)
held that a claim under § 1983 can be stated against a private party who invokes a state procedure where the procedure is challenged as being unconstitutional.

Petitioner's collateral attack on that judgment.[7] Apparently, Petitioner thought that general conspiracy allegations would somehow establish the necessary state action which is otherwise lacking in this case. Although private acts can support liability under 42 U.S.C. § 1983, if the individual is engaged in a conspiracy with the state or its agents, Petitioner's original and amended complaints did not provide any factual basis to support the naked allegation of a conspiracy. *Dennis v. Sparks*, 449 U.S. 24 (1980); *Hale v. Harney*, 786 F.2d 688 (CA5 1986).

Numerous cases have examined generalized "conspiracy" allegations, such as those presented by Petitioner. Because of the ease with which a party can allege the existence of a conspiracy in order to attempt to establish jurisdiction under § 1983, the federal courts have uniformly held that general allegations will *not* serve to satisfy the "under color of state law" requirement of § 1983. Instead, specific allegations of a conspiracy and the facts supporting its existence must be pled. See, *e.g.*, *Earnest v. Lowentritt*, 690 F.2d 1198 (CA5 1982); *Glaros v. Perse*, 628 F.2d 679 (CA1 1980); *Skepton v. County of Bucks, Pa.*, 613 F.Supp. 1013 (E.D.Pa. 1985); *Francis-Sobel v. University of Maine*, 597 F.2d 15 (CA1 1979), *cert. denied*, 444 U.S. 949 (1979).

---

[7] The Oxley Firm filed its Motion to Dismiss Petitioner's complaint under Fed. R. Civ. P. 12(b)(6) on November 23, 1992. On January 11, 1993, Petitioner filed an amended complaint in the District Court setting forth five additional paragraphs in an attempt to state that the actions of appellees were taken "under color of state law." In each of these additional paragraphs, Petitioner contended in general, conclusory fashion that a conspiracy existed between the Oxley Firm and the state court judges.

In *Earnest, supra*, the Court of Appeals affirmed the District Court's dismissal of a § 1983 complaint making general, conclusory allegations about a trial court's alleged conspiracy in a routine foreclosure action. The court held that in order to state a claim under § 1983, specific, detailed facts of the conspiracy must be pled. The court stated:

> Even if this Court did read the complaint as alleging illegal joint action between the [trial] judge and the defendants, the record is totally devoid of any facts at all to support a finding that the state judge was improperly or maliciously involved in the foreclosure. Any assertion of illegal motive on the part of the judge is purely conclusory, unsupported by any pleaded facts. 690 F.2d at 1200-1201.

In *Glaros v. Perse, supra*, the court likewise held that general conspiracy allegations concerning the conduct of state officials are insufficient to state a claim under § 1983. The court held that specific facts supporting the existence of a conspiracy must be pled. The court stated:

> Apart from conclusory statements that all defendants acted under color of law, and generalized allegations of conspiracy between all defendants, there was only the allegation that the individual private defendants 'cooperated in the surveillance of Petitioner on the request of governmental agencies.' ...[G]eneral allegations of cooperation between private individuals and unspecified

> governmental agencies do not, in our opinion, make out a claim of action taken under color of state law. See *Grow v. Fisher*, 523 F.2d 875, 878-79 (7th Cir. 1975).... This is in line with our requirement that some factual basis supporting the existence of a conspiracy must be pled when a conspiracy is alleged in a civil rights case. *Francis-Sobel v. University of Maine*, *supra*, 597 F.2d at 17; *Slotnick v. Staviskey*, *supra*, 560 F.2d at 33. *See also Sparkman v. McFarlin*, 601 F.2d 261, 266-67 (7th Cir. 1979) (Sprecher, J., concurring). *Id.* at 685.

See, also *Hale v. Harney*, 786 F.2d 688, 690 (CA5 1986) (requiring that the "claimant ... state specific facts, not merely conclusory allegations" of a conspiracy); *Arsenaux v. Roberts*, 726 F.2d 1022, 1024 (CA5 1982) (holding that "mere conclusory allegations of conspiracy cannot, absent reference to material facts" state a claim of conspiracy under 42 U.S.C. § 1983); *Thompson v. Aland*, 639 F.Supp. 724, 729 (N.D. Tex. 1986) (stating that "[m]ere characterization of defendants' conduct as conspiratorial or unlawful does not set out allegations upon which relief can be granted" under 42 U.S.C. § 1983).

In this case, neither Petitioner's original complaint nor his amended complaint set forth any facts supporting the existence of a conspiracy. Petitioner has not alleged which member of the Oxley Firm conspired with any of the state court judges. Nor does Petitioner identify when the conspiracies were formed or what the alleged inducement

was for any of the state court judges to have "conspired" with Respondents to "fix" the underlying proceeding seeking payment of $1,947.62 on an overdue electric account. Without the necessary supporting factual allegations for the existence of a conspiracy, Petitioner's generalized allegations fall far short of the state action required to support a claim under § 1983 and his complaint was properly dismissed by the District Court.

C. Petitioner Mischaracterizes The Holdings Of The District Court And The Sixth Circuit Court Of Appeals When He Argues That His Complaint Was Dismissed Based On Immunity. At No Time Did Either Of The Lower Courts Ever Determine That Respondents Were Immune From Suit.

Petitioner devotes a great deal of time in his petition arguing that the Sixth Circuit Court of Appeals erred in allegedly extending immunity to the Oxley Firm. See *Brief of Petitioner*, at pages 8-18. Petitioner even goes so far as to question the motives of the Sixth Circuit Court of Appeals for not publishing its opinion. *Id.* at 14. According to Petitioner, the Court of Appeals sustained the District Court's dismissal of the complaint under a theory that Respondents were immune from suit. Continuing, Petitioner contends that attorneys are no longer immune from suit under 42 U.S.C. § 1983.

A cursory examination of the holdings of the District Court and Court of Appeals demonstrates that Petitioner's complaint was not dismissed on the basis of immunity. Although Petitioner relies on the decision in *Wyatt v. Cole*, __ U.S. __ (1992), for the proposition that attorneys are not immune under § 1983 for having provided representation in a state court proceeding, the lower courts did not consider the issue of immunity. Instead, the complaint was dismissed because it did not contain allegations satisfying the "under color of state law" requirement necessary to maintain an action under § 1983. The courts below properly applied, *inter alia*, the holdings in *Lugar* and *Flagg Brothers, Inc.*, and determined that allegations of a private party's misuse of a state procedure alone are not sufficient to state a cause of action under § 1983. The Court of Appeals stated:

> In this case, Hickey is not challenging the validity of the various state statutes and procedural rules used by Hollister in pursuing and defending the underlying state litigation for Hancock Wood. Rather, Hickey is challenging alleged misuse of these statutes and procedures. For example, Hickey alleges that Hollister 'falsely and maliciously and without reasonable or probable cause whatsoever, filed the collection action in Bowling Green Municipal Court while knowing that court did not have jurisdiction and, as a result, caused an invalid default judgment to be entered, from which Hollister then availed his client of the debtor examination procedures of the municipal

> court.' These allegations, as do the other similar allegations concerning Hollister's actions in defending the state court proceeding brought by Hickey, merely allege that Hollister abused the state statutes and procedures. At no time has Hickey alleged that these statutes or procedures violate the Constitution or federal law. (Petitioner's Appendix, A-38-39.)

Similarly, the Court of Appeals rejected Petitioner's conspiracy allegations, not on the basis of immunity, but because Petitioner's allegations were vague and conclusory. The Court of Appeals stated:

> Hickey's allegations that Hollister conspired with the various state court judges are conclusory and unsupported by any factual allegations or inferences. For example, Hickey's complaint alleges that Hollister, 'under color of state law, and at [his] instigation, conspired with the judge of the Municipal Court to rule that jurisdiction was proper, to issue a summons by mail, and to arrest Hickey.' Hickey does not specify any facts upon which his allegations of conspiracies are based. Hickey does not identify when the conspiracies were formed or what the inducement was for the judge to have 'conspired' with Hollister to take these allegedly improper actions in the underlying litigation involving a $2,526.36 debt on an

electric account.[8] (Petitioner's Appendix, A-41.)

Notwithstanding Petitioner's assertions to the contrary, the courts below did not hold, nor did they even address whether the Oxley Firm was "immune" from suit under 42 U.S.C. § 1983. The complaint was dismissed under the well-established authority of *Lunger* and *Flagg Brothers, Inc.*, that the private misuse of a state statute does not describe conduct attributable to the state that can be redressed under § 1983. Petitioner does not challenge or seek to distinguish the holdings in *Lunger* or *Flagg Brothers, Inc.* Nor does Petitioner offer any reason to review the well-settled principles articulated in those cases. Because Petitioner failed to assert the necessary state action needed to sustain a claim under § 1983, his complaint was properly dismissed.[9]

---

[8] Citing *Lugar v. Edmondson* and *Earnest v. Lowentritt*, the District Court dismissed the complaint not because of any immunity, but because Petitioner's complaint neither challenged the constitutionality of the Ohio statute on collection, nor could the court construe it as so. "It is clear that plaintiff is not challenging the state created procedure on collection but the alleged misuse of that procedure by defendants. The Court finds that defendants were not acting under color of state law by attempting to collect on a judgment." (Petitioner's Appendix, A-21.)

[9] At pages 23-24 of his Petition, Hickey alleges that Respondents violated DR 7-102 of the Ohio Code of Professional Responsibility. It is unclear whether Petitioner is merely complaining of this alleged conduct or asking this court to adjudicate any potential violation of the Ohio Code of Professional Responsibility. Suffice it to say that if Petitioner seriously intends to contend that Respondents violated the Ohio Code of Professional Responsibility, then he should pursue appropriate relief at the state court level through the Board of Commissioners on Grievances and Discipline established by the Ohio Supreme Court.

CONCLUSION

It is respectfully submitted that Petitioner has failed to establish any reason why the writ should be issued. The decisions by the District Court and the Sixth Circuit Court of Appeals properly applied longstanding principles previously set forth by this court in *Lugar*, *Adickes* and *Flagg Brothers, Inc*. No conflict exists between the applicable decisions of this court and the holdings below. The petition presents no questions which have not previously been reviewed and decided by this court. Accordingly, the Petition for a Writ of Certiorari should be denied.

H. WILLIAM BAMMAN
Manahan, Pietrykowski,
Bamman & DeLaney
414 North Erie Street
P.O. Box 2328
Toledo, Ohio 43603
(419) 243-6148

Counsel for Respondents,
Robert B. Hollister and Oxley,
Malone, Fitzgerald & Hollister